No. 19-508

IN THE

Supreme Court of the United States

AMG CAPITAL MANAGEMENT, LLC ET AL.,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND NATIONAL RETAIL FEDERATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in each industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members before Congress, the Executive Branch, and the Courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The National Retail Federation is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers from the United States and more than 45 countries. Retail is the largest private-sector employer in the United States, supporting one in four U.S. jobs—approximately 42 million American workers—and contributing $2.6 trillion to the annual GDP. NRF periodically submits *amicus curiae* briefs in cases raising significant legal issues impacting the retail community. The appropriate scope of enforcement powers granted by Congress to the Federal Trade Commission ("FTC" or "Commission") is an important issue

[1] No party's counsel authored any part of this brief. No one apart from *amici*, their members, and their counsel contributed money intended to fund the brief's preparation or submission. All parties have consented to the filing of this brief.

to both the Chamber of Commerce members and the National Retail Federation members. Defining and enforcing the limits of these powers ensures that industries and markets function effectively.

SUMMARY OF ARGUMENT

This Court should grant the petition for a writ of certiorari to curtail the FTC's recent assertion of expansive equitable powers to seek massive restitution and disgorgement awards under Section 13(b) of the Federal Trade Commission Act ("FTC Act"). The FTC's interpretation of the statute imposes unwarranted costs and uncertainties on businesses and the public.

I. A. Although the FTC once understood that Section 13(b) has a more limited role in the statutory scheme, the Commission now routinely seeks monetary relief under that provision, contrary to the text and structure of the FTC Act. Section 13(b) is limited to injunctive relief and therefore does not authorize the FTC to demand monetary awards in the form of restitution or disgorgement. Rather, Congress authorized the FTC to seek monetary awards under Section 19 of the FTC Act, which affords businesses important procedural and substantive protections designed to ensure fair notice before imposition of such financial remedies.

B. Yet, in just six years since it reconsidered its Section 13(b) equitable powers, the FTC has increased its yearly restitution and disgorgement penalties by more than 23 times the earlier amounts it had sought and obtained. In 2017, the FTC used Section 13(b) to collect $5.29 *billion* in disgorgement and restitution. The FTC touts the present case, in which petitioners were ordered to pay $1.3 billion in restitution, as the largest judgment it has ever obtained.

C. At the same time, the FTC disclaims any obligation to put the public and affected businesses on notice of what business practices constitute a violation of the Act—an especially serious problem considering the inherent ambiguity of the statutory prohibition against "unfair" practices. The FTC further asserts that it need not precisely prove the amount of restitution or disgorgement, but rather may impose a monetary award that "reasonably approximates the defendant's unjust gains." Businesses are thus left with grave uncertainty about whether the FTC will find that their conduct violates the FTC Act and what retroactive monetary liability they may face as a result.

II. Other federal agencies, from the CFTC to the FDA, have claimed similarly broad powers, and courts are split as to whether those powers are as broad as the agencies claim. This brings substantial confusion to businesses because they do not know when overlapping statutory schemes will expose them to massive monetary penalties. The statutes governing those agencies are much more like the FTC Act than the statute at issue in *Liu v. SEC*, No. 18-1501 (pet. granted Nov. 1, 2019), because they authorize relief to restrain or enjoin violations, as opposed to authorizing equitable relief more generally. Thus, considering this case along with *Liu* would provide much-needed guidance to courts and the regulated public alike.

III. The decision below was wrong, under both a textual and a contextual analysis. Accordingly, to bring certainty to businesses around the country, *amici* ask this Court to grant the petition for a writ of certiorari to clarify that the FTC's Section 13(b)

authority is limited to prospective injunctions, not monetary damage awards.

ARGUMENT

I. This Court Should Guide Businesses by Curtailing the FTC's Perceived Authority to Seek Monetary Awards Under Section 13(b)

The staggering $1.3 billion restitution award in this case exemplifies the Commission's recent expansion of its right to seek injunctive relief under Section 13(b). If this Court does not step in to resolve the circuit split, businesses will be left to guess the limits of the FTC's power. Moreover, in light of the division among courts of appeals, a business's exposure to the FTC's extreme remedies will vary wildly depending on where the FTC chooses to bring suit. The staggering size of the monetary awards demanded, and the FTC's refusal to provide notice to businesses of what conduct it deems illegal, renders this inconsistency and uncertainty unacceptably risky.

The FTC's actions have created no record or series of practices from which a business can derive "notice" of what conduct the agency deems to violate the FTC Act's vague prohibition on "unfair" practices. In fact, the FTC has determined that even "common" business practices may violate the FTC Act and give rise to a claim for substantial monetary judgments.

A. The FTC Is Increasingly Willing to Seek Monetary Relief Under Equitable Powers

The FTC only arrived at its expansive interpretation of its powers under Section 13(b) within the last decade. Before 2012, the FTC had publicly stated that it would seek disgorgement or restitution only in "exceptional cases" where there was, among other things, a "clear violation" of the law, which ensured proper notice. *Policy Statement on Monetary Equitable Remedies in Competition Cases*, 68 Fed. Reg. 45821 (Aug. 3, 2003), 2003 WL 21780660 ("Policy Statement"). But in 2012, the Commission withdrew that Policy Statement, claiming it had taken "an overly restrictive view" of the FTC's discretion to seek monetary awards. *Withdrawal of the Comm'n Policy Statement on Monetary Equitable Remedies in Competition Cases*, 77 Fed. Reg. 47071 (Aug. 7, 2012), 2012 WL 3163476 ("Policy Withdrawal"). The FTC also purported to expand its powers in other ways, contending that it could seek monetary awards irrespective of whether the alleged misconduct is a "common" business practice. *Id*. It did all of this without formal notice and comment rulemaking, which would have given businesses a chance to be heard.

The FTC's Policy Statement and subsequent withdrawal of that statement specifically addressed monetary remedies in antitrust cases, but the FTC has asserted that it has similar power to obtain such remedies under Section 13(b). The FTC's statements thus relate directly to its understanding of whether it may seek monetary remedies under its authority

to seek injunctions. The Commission now increasingly seeks restitution in cases outside the antitrust context even to target "common" business conduct. Indeed, the present case is a prime example, where the loan disclosures found to violate Section 5 were widespread in the industry. *See* Pet. at 7.

B. The Size of the FTC's Monetary Awards Amplifies the Detrimental Business Impact

With the 2012 sea change in its willingness to employ Section 13(b) for monetary relief, the FTC began aggressively pursuing monetary remedies under the guise of equity. The resulting uncertainty is compounded by the staggering size of the monetary awards demanded by the FTC and by its refusal to provide notice to businesses of what conduct the FTC deems to violate the FTC Act.

The FTC boasted that the award here is "the largest litigated judgement ever obtained by the FTC."[2] The rapid change in exposure for U.S. businesses that this award represents is staggering. In 2017 alone, the FTC obtained **<u>$5.29 billion</u>** through court orders for restitution and disgorgement.[3] By contrast, in 2011—just before its policy change—the

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[2] Press Release, FTC, *U.S. Court Finds in FTC's Favor and Imposes Record $1.3 Billion Judgment Against Defendants Behind AMG Payday Lending Scheme* (Oct. 4, 2016), https://tinyurl.com/yb8mrxxt.

[3] FTC, *A Recap of 2017: FTC's Annual Highlights* (Apr. 10, 2018), https://tinyurl.com/yy2d68k3.

FTC obtained only $223.7 million.[4] The Commission's newly aggressive stance on restitution has thus exploded the value of such awards **by more than 23 times** in just a few years. The sheer magnitude of these awards has understandably unsettled the business community, which has struggled to understand the potential liability that may result from a purported violation.

C. The FTC Fails to Provide Businesses with Fair Notice of Prohibited Conduct Before Seeking Monetary Sanctions

The FTC claims it has no obligation to provide advance notification to businesses of what practices purportedly violate the FTC Act. In its view, it is empowered to seek substantial monetary awards regardless of whether the alleged misconduct is "common or novel, clearly a violation or never before considered." Policy Withdrawal at 47071. In other words, the FTC declared that there was no "basis for creating a heightened standard" requiring "a notice requirement." *Id.* Under the FTC's new enforcement regime, businesses could face potential liability for millions or, as here, *billions* of dollars in disgorgement or restitution based on common industry practices that may not even clearly violate the FTC Act.

This uncertainty hampers business and investment activity. In 2015, two FTC Commissioners criticized the FTC for failing to provide "meaningful

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[4] FTC, Annual Highlights 2011*: Stats & Data* (Feb. 29, 2012), https://tinyurl.com/y4j4ecgg.

guidance on when [businesses] will be forced to disgorge their profits for an antitrust violation," and noted that "[t]his uncertainty and lack of predictability faced by firms is unacceptable."[5]

The FTC's expanded use of disgorgement is inconsistent with the FTC Act's sharp distinction between forward-looking injunctive relief—the only remedy permitted under Section 13(b)—and backward-looking monetary relief under Section 19(b), which affords additional procedural protections to businesses. *See* 15 U.S.C. §§ 53(b), 57. That distinction is crucial to the business community. As the Seventh Circuit recently held, because the FTC Act's general prohibition against "unfair or deceptive acts" is vague, the FTC must provide the public with fair notice of prohibited conduct *before* it imposes monetary sanctions for past conduct. *See FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 784 (7th Cir. 2019) (describing notice as "a central feature of the FTCA provisions that expressly permit monetary relief"). The FTC's 2012 policy change blurs the notice lines, making it impossible for businesses to know when their conduct exposes them to potentially massive disgorgement or restitution liability, as is the case for petitioners here. In short, reading "an implied restitution remedy into section 13(b) allows the Commission to circumvent the FTCA's detailed notice requirements." *Id.*

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[5] FTC, *Separate Statement of Commissioners Maureen K. Ohlhausen and Joshua D. Wright,* Fed. Trade Comm'n v. Cephalon, Inc. 2-3 (May 28, 2015), https://tinyurl.com/yy787grj.

The uncertainty created by the FTC's shifting policy is further magnified because courts have agreed with the FTC that it need not prove the amount of restitution with precision. Instead, courts have held that the FTC may seek an award that "reasonably approximate[s] the amount of the defendant's unjust gains." *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 368 (2d Cir. 2011); *see also FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 603 (9th Cir. 2016) (same); *FTC v. Kuykendall*, 371 F.3d 745, 766 (10th Cir. 2004) (en banc) (same). The burden then falls to the defendant to show the FTC has overstated the harm. *Commerce Planet, Inc.*, 815 F.3d at 604. Under that rubric, "[a]ny risk of uncertainty . . . falls on the wrongdoer." *Id.* (citation and internal quotation marks omitted).

Judicial construction of laws regulating businesses is "grounded not only on economic prediction" but also "business certainty." *Arizona v. Maricopa Cty. Med. Soc.*, 457 U.S. 332, 354 (1982) (describing judicial construction of the Sherman Act). To be a "profitable business," a company "must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct" as unlawful. *First Nat. Maint. Corp. v. NLRB*, 452 U.S. 666, 679 (1981). As the federal regulator of unfair business practices, the FTC has a significant effect on business throughout the country, and confusion about its powers harms the nation's economy. This Court should grant the petition for a writ of certiorari to afford businesses the certainty they need—and that the law requires them to receive—so they can appropriately structure industry practices.

II. Other Federal Agencies Frequently Claim Sweeping Disgorgement and Restitution Powers

The importance of this issue extends beyond the FTC Act. Other agencies have begun to use their equitable powers in a similar fashion, seeking monetary penalties where the statutory scheme contemplates only injunctive or equitable remedies. Courts have taken different approaches to these assertions of agency equitable authority, making it onerous for businesses in different sectors and locations to adapt.

For example, the Food, Drug, and Cosmetic Act (FDCA) authorizes the Food and Drug Administration (FDA) to "restrain" violations. 21 U.S.C. § 332(a). The FDA has repeatedly used this *prospective* power to demand substantial *retrospective* disgorgement and restitution awards. *See, e.g.*, *United States v. Lane Labs-USA Inc.*, 427 F.3d 219, 234 (3d Cir. 2005) (discussing consent decrees ordering disgorgement with Abbott Labs ($100 million), Wyeth-Ayerst ($30 million), and Schering-Plough ($500 million)). Courts have generally affirmed the FDA's ability to seek these awards while signaling that it is "a close call" because "the FDCA does not specifically authorize restitution." *Id.* at 223; *see also United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1061 (10th Cir. 2006); *United States v. Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 764 (6th Cir. 1999).

Similarly, the Eleventh Circuit held that the Commodity Futures Trading Commission (CFTC) could recover restitution under a provision of the

Commodity Exchange Act that authorizes injunctions. *Commodity Futures Trading Comm'n v. Wilshire Inv. Mgmt Corp*., 531 F.3d 1339, 1345 (11th Cir. 2008). The court reasoned that the award "was based on the amount the customers lost, not the amount of unjust enrichment received," which brought it under the umbrella of equity. *Id*. The Third Circuit, however, concluded that "an award of restitution under [the Commodity Exchange Act's injunction provision] measured in the amount of customer losses is generally improper." *Id*. (explaining *Commodity Futures Trading Comm'n v. Am. Metals Exch. Corp*., 991 F.2d 71, 78 (3d Cir. 1993)).

On the other hand, the D.C. Circuit rejected an attempt by the U.S. Department of Justice to seek disgorgement under the civil RICO statute because the statute's authorization of injunctive relief is "limited to forward-looking remedies." *United States v. Philip Morris USA Inc*., 396 F.3d 1190, 1198 (D.C. Cir. 2005). The *Philip Morris* court determined that a general grant of "equitable jurisdiction" does not automatically include the remedy of disgorgement when that power is not contemplated by the statutory language itself. *Id*. at 1197.

Finally, on November 1, 2019, this Court granted a writ of certiorari in *Liu v. Securities and Exchange Commission*, No. 18-1501. The question presented in *Liu* is whether the Securities and Exchange Commission may seek and obtain disgorgement from a court as "equitable relief" under the Securities Act of 1933, 15 U.S.C. §§ 77a *et seq*., and the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq*. This case concerns a related type of agency over-

reach, but presents a distinct issue of statutory construction that is worthy of this Court's attention. Indeed, the issue here—whether a statute's use of the word "injunction" authorizes monetary remedies—is more analogous to the FDA and CFTC cases above than the question presented in *Liu*. Granting the petition for a writ of certiorari in this matter would allow the Court to clarify each agency's powers under their respective statutory schemes. The resolution of both issues would benefit U.S. businesses and the public at large.

III. The Ninth Circuit's Decision Below Is Wrong and Should Be Corrected

Finally, as ably outlined in the petition, the interpretation of Section 13(b) adopted by the majority of circuits—including the Ninth Circuit in the decision below—contradicts the plain meaning of the statute. Section 13(b) permits the Commission to seek an injunction in federal district court when it "has reason to believe" a person "is violating, or about to violate" Section 5 of the Act. 15 U.S.C. § 53(b). Even though Section 13(b) is limited to injunctive relief, the Ninth Circuit held that Section 13(b) allows the court to award "ancillary relief," including restitution. *FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417, 426 (9th Cir. 2018).

The Ninth Circuit's interpretation of Section 13(b) is contrary to its text and purpose. As Judge O'Scannlain noted in his special concurrence below, the plain statutory language of Section 13(b) "anticipates that a court may award relief to prevent an *ongoing* or *imminent* harm—but not to deprive a defendant of 'unjust gains from *past* violations.'" *Id.* at

430 (quoting *Commerce Planet*, 815 F.3d at 598). The plain language of Section 13(b) is limited to the power to "enjoin" current or imminent Section 5 violations. Section 13(b) serves as "a simple stop-gap measure that allows the Commission to act quickly to prevent harm." *Id.* at 431. It does not provide monetary relief (such as restitution here) for past actions. *Id.*; *see also FTC v. Shire ViroPharma, Inc.*, No. 18-1807, 2019 WL 908577, at *7, 9 (3d Cir. Feb. 25, 2019) (holding that Section 13(b) is "unambiguous" that it only "prohibits existing or impending conduct" and thus "a violation in the distant past and a vague and generalized likelihood of recurrent conduct" was insufficient).

The holding below is also inconsistent with the FTC Act as a whole, which provides for forward-looking injunctive relief under Section 13(b) while providing a backward-looking monetary remedy under Section 19. Section 19 empowers the FTC to seek financial relief, to punish recalcitrant actors, and to remediate past violations. 15 U.S.C. § 57b. The Ninth Circuit's holding, which reads Section 13(b) to implicitly authorize monetary relief, renders Section 19 superfluous. *See Bilski v. Kappos*, 561 U.S. 593, 607–08 (2010) (explaining the statutory canon that courts should not "interpret[] any statutory provision in a manner that would render another provision superfluous"); *see also Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Section 19 requires that, to obtain monetary relief, the FTC must either (1) prove that the defendant "violate[d] any rule under this subchapter respecting unfair or deceptive acts or practices" (*i.e.*, a rule promulgated by the Commission), or (2) if no such violation exists, obtain a "final cease and desist order" through an administrative proceeding, and then prove to a trial court that the defendant's conduct was such that a "reasonable man" would know it was "dishonest or fraudulent." 15 U.S.C. §§ 57b(a)(1)–(2). As Judge O'Scannlain explained in his special concurrence, Section 19(b) "requires the Commission either to promulgate rules that define unlawful practices ex ante, or first to prosecute a wrongdoer in an administrative adjudication that culminates in a cease and desist order." *AMG*, 910 F.3d at 432. Those protections, which are central to Congress's design and to basic fairness to regulated businesses, are eliminated by the FTC's use of Section 13(b) to seek monetary penalties. "Without a clear textual signal," courts "cannot presume that Congress implicitly made such a consequential shift in policy" by eliding the two provisions. *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d at 774.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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